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Nos. 98-404 and 98-564

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Appellants,
v.
UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Appellees.

On Appeal From the United States District Court For the District of Columbia

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WILLIAM J. CLINTON, ET AL.,
Appellants,
v.
MATTHEW GLAVIN, ET AL.,
Appellees.

On Appeal From the United States District Court For the Eastern District of Virginia

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AMICUS CURIAE BRIEF OF NATIONAL CITIZENS LEGAL NETWORK, U.S. BORDER CONTROL, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, ENGLISH FIRST FOUNDATION, AND POLICY ANALYSIS CENTER IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

Amici curiae, National Citizens Legal Network, a project of Citizens United Foundation, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Each of the *amici* was separately established in the District of Columbia or the Commonwealth of Virginia within the past twenty years for purposes related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.[2]

This brief is intended to assist the Court in fully developing the issues in the matters now before this Court. Hopefully, the perspective of nonprofit educational organizations, including

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. *See* Supreme Court Rule 37.3(a).

these *amici curiae*, will assist this Court in obtaining a better understanding of the ramifications of this legal dispute.

The two cases now before this Court concern the authority of the appellants, who include the President and the U.S. Department of Commerce, to use statistical sampling in the next United States decennial census ("the 2000 Census") as a partial substitution for an actual enumeration of the population. These *amici*, particularly because of their interest in the integrity of constitutional processes, are deeply concerned about appellants' plan to substitute statistical sampling techniques for an actual enumeration in the 2000 Census to determine the population of the states for apportionment purposes, believing that appellants' plan would violate not only the Census Act, but the Constitution as well.

SUMMARY OF ARGUMENT

Two three-judge panels of separate United States district courts have concluded, in unanimous opinions, that appellants' proposed use of sampling techniques in the 2000 Census to estimate the population for purposes of apportionment is illegal. Both opinions found that the Census Act (at 13 U.S.C. Sec. 195) proscribes the use of sampling to determine the population for decennial apportionment. The decisions of the courts below are correct and should be affirmed.

The district courts did not find it necessary to reach the question of whether, under the Constitution, Congress may authorize the Secretary to use sampling to determine state populations for purposes of apportionment. If this Court should reach that question, the Constitution (*see* Art. I, Sec. 2, Cl. 3, and Sec. 2 of the Fourteenth Amendment) provides the

clear, unambiguous answer: the census must be an "actual enumeration," and the process must be one of "counting the whole number of persons in each state."

Appellants' invitation to disregard the plain meaning of the Constitution's precise language should be rejected. Review of the historical record supports the fact that "actual enumeration" as used in Art. I, Sec. 2, Cl. 3, was intended to have its plain meaning. The Framers of the Constitution foresaw the concern that would be raised by appellants' census plan: the danger of politically manipulated apportionment. The Framers were aware that an actual enumeration — an actual "headcount" — was necessary to guarantee the representative nature of the lower house of Congress, whose membership would be distributed by state according to population. They wisely mandated a census by actual enumeration, refusing to leave the matter to the discretion of executive officials or legislators.

Current events show that the risk of manipulation is real. Investigations and reports by committees of the 105th Congress underscore concerns regarding the deeply politicized agency which supervises the administration of the census — the Commerce Department. A census by actual enumeration is necessary to preserve public confidence in the integrity of the House of Representatives as well as to guard against the appearance of political corruption.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CENSUS ACT PROHIBITS SAMPLING FOR PURPOSES OF APPORTIONMENT

Three-judge panels of two federal district courts each ruled unanimously that the plain language of Sections 141 and 195 of the Census Act prohibits the Secretary of Commerce from employing sampling methods to determine state population totals for purposes of apportioning seats in the U.S. House of Representatives. *See* United States House of Representatives v. United States Dept. of Commerce, C.A. No. 98-0456 (D.D.C., Aug. 24, 1998) ("House v. Commerce"), J.S. App. 1a-67a (No. 98-404); Glavin v. Clinton, C.A. No. 98-207-A (E.D. Va., Sept. 24, 1998), J.S. App. 1a-22a (No. 98-564). The district courts' holdings should be affirmed.

Although sampling may be used to gather certain information during the decennial census, the Census Act expressly prohibits sampling "for the determination of population for purposes of apportionment of Representatives in Congress among the several States...." 13 U.S.C. Sec. 195. For purposes other than apportionment, Section 195 requires the use of sampling if the Secretary of Commerce "considers it feasible."[3] Section 141 likewise permits, at the Secretary's discretion, the use of sampling procedures and special surveys

[3] Since the requirement to use sampling for nonapportionment purposes hinges upon the Secretary's determination that such sampling is "feasible," Sec. 195 can be said to authorize such sampling at the Secretary's discretion. *See* fn. 6, *infra*, and accompanying text.

as part of the decennial census — although, as the court stated in House v. Commerce, in the case of apportionment, the general authorization gives way to the express prohibition of Sec. 195. J.S. App. at 60a-67a. *See also* opinion of the court in Glavin v. Clinton, J.S. App. at 18a-22a.

Appellants read the first clause of Sec. 195 ("Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States...") as an exception to a "mandatory directive" ("the Secretary shall, if he considers it feasible, authorize [sampling]."). Appellants argue that "[n]o rule of statutory construction suggests...that activities specifically excepted from a mandatory directive are thereby prohibited." Aplt. Brief, pp. 28-29.[4] Citing several examples of what they term the "except/shall formulation," appellants state that the exception from a mandatory directive does not constitute a prohibition in any of them. *Id.*, n. 15. Appellants contend, therefore, that the general permission to sample under Sec. 141 governs, granting the Secretary authority to use sampling for all purposes, including apportionment. *Id.*, p. 29. The effect of the two sections of the statute, according to appellants, is to allow the Secretary to use sampling for apportionment purposes at his discretion.

Under this strained reading of Sec. 195, the exception to the general authorization to use sampling would be wholly negated, since the Secretary could employ sampling both for nonapportionment purposes "if he considers it feasible" and, again at his discretion, for apportionment purposes. Such a

[4] "Aplt. Brief" refers to the brief for appellants filed by the Solicitor General of the United States with this Court in Docket No. 98-404.

reading would render the exception in Section 195 devoid of meaning. Statutes must be read so that every word has some operative effect, so as to avoid "emasculating" a Congressional enactment. *See* Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 1166 (1997); United States v. Menasche, 348 U.S. 528, 538-39 (1955).[5]

Contrary to appellants' reading of Sec. 195, the second clause of Sec. 195 is not a "mandatory directive." It directs the Secretary of Commerce to authorize the use of sampling "if he considers it feasible." The Secretary therefore has discretion to employ sampling (dependant on whether he considers sampling feasible) "except...for purposes of apportionment." Appellants' analysis of the second clause of Sec. 195 as a "mandatory directive" might have been closer to the plain meaning of the statute if Sec. 195 omitted entirely all references both to feasibility and to the Secretary's judgment (*i.e.*, sampling must be employed in all situations).[6] As it

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[5] Prior to the enactment of the current language of Sec. 195 in 1976, Sec. 195 stated "Except...for apportionment purposes, the Secretary may, where he deems it appropriate [employ sampling]." The 1976 amendment, therefore, at most emphasized the Congressional authorization to use sampling for purposes other than apportionment. As the District Court stated in House v. Commerce, Congress would not have employed such an oblique method to allow sampling for apportionment purposes. *Id.*, p. 67; J.S. App. at 60a-61a. Also, the amendment clarified the exception to the general authority to employ sampling by making it more specific, since after 1976 the exception applied to "apportionment of Representatives in Congress among the several States," and not merely to "apportionment."

[6] Even if considered a mandatory directive, as the District Court for the Eastern District of Virginia pointed out, an exception to a mandatory directive can, and often does, constitute a prohibition of the excepted activity. *See* Glavin v. Clinton, Sl. Op., p. 26.

stands, however, Sec. 195 permits the use of sampling at the Secretary's discretion, except for "the determination of population for purposes of apportionment of Representatives in Congress among the several States."

The Administration's plan therefore violates the Census Act by requiring the illegal use of statistical estimation methods to determine population counts for purposes of apportionment.

II. THE PLAIN LANGUAGE OF THE CONSTITUTION REQUIRES AN ACTUAL ENUMERATION FOR PURPOSES OF APPORTIONMENT

The courts below did not reach the constitutional question. Thus, if this Court affirms the determination of either court regarding the Census Act, resolution of the constitutional question is not necessary. If, however, this Court should reach the constitutional question, the answer is certain: the population of the United States in the decennial census, for purposes of apportionment, must be actually enumerated, not merely estimated.

A. The Constitutional Language Must Be Given Its Normal and Intended Meaning

Art. I, Sec. 2, Cl. 3 of the Constitution requires Congress to enact a law requiring a decennial census be conducted to determine the number of representatives to be elected to the

House of Representatives from each state. Additionally, that Clause, as modified by Sec. 2 of the Fourteenth Amendment, requires that the law enacted by Congress provide for the "actual enumeration" of the American populace by "counting the whole number of persons in each State, excluding Indians not taxed."

Appellants argue that the Constitution does not require an actual headcount of the American people, but merely an estimate of the number of people in each state. Aplt. Brief, pp. 39-49. To support this contention, appellants have ignored key words contained in both Art. I, Sec. 2, Cl. 3, and in Sec. 2 of the Fourteenth Amendment. Aplt. Brief, pp. 40-41. Additionally, they have lifted out of context other words, claiming that the only constitutional requirement is that a census be taken to "further the goal of equal representation for equal numbers of people." *See id.*, p. 46, n. 28.

The language of the relevant constitutional provisions, however, is not susceptible of such a strained interpretation. Because Art. I, Sec. 2, Cl. 3 requires Congress to enact a law providing for a census by "actual enumeration," Congress is not free to legislate to provide for a census count by any method of its own choosing. And because Sec. 2 of the Fourteenth Amendment contains a parallel call for a "counting of the whole number of persons in each State," Congress cannot by law direct a census to count some of the persons in each state and "estimate" the number of those not counted. In short, the plain meaning of the constitutional text denies to both the Congress and the Executive Branch the authority to employ statistical methods to calculate the population of each state for purposes of apportionment.

B. The Plain Meaning Doctrine Governs

From the earliest days of the Republic, this Court has observed the principle that the "words of the constitution are to be taken in their obvious sense." Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 618 (1895). As Chief Justice Marshall stated in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824), "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Sixty-five years later, Justice Lucius Q. C. Lamar elaborated upon this rule for a unanimous Court. Justice Lamar wrote:

> Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such a case there is the well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of the framers, and of the people adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for meaning beyond the instrument. [The Board of County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).]

More recently, this Court applied the plain meaning rule in a case of first impression. Federal District Judge Walter L. Nixon sought review of his conviction by the United States Senate on charges of impeachment, claiming that he had not been given a "judicial trial" before the full Senate, as required by Art. I, Sec. 3 (which provides that "[t]he Senate shall have sole Power to try all Impeachments"). Nixon v. United States, 506 U.S. 224, 229 (1993). This Court refused to accept Mr. Nixon's effort to impose a technical meaning upon the word "try," noting that the dictionary gives it "considerably broader meanings than those to which petitioner would limit it." *Id.* In addition to ascribing a common sense meaning to "try," this Court observed that the Constitution had granted to the Senate the "sole" power to examine impeachment charges. Again, this Court chose the "common sense meaning" of the word "sole," concluding "that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted." *Id.*, 506 U.S. 230-31.

Having followed in the Nixon case "the well established rule that the plain language of the enacted text is the best indicator" of the meaning of a particular constitutional provision, *id.*, 506 U.S. at 232, this Court demonstrated the continuing vitality of the traditional rule that the meaning of a constitutional text is determined by "the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 670. As Justice Lamar explained in the Rollins case:

> If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. [*Id.*]

The question here is whether the words used in the Constitution that govern the conduct of the decennial census "convey a definite meaning" and, if so, if that meaning is consistent with or contrary to other parts of the document.

1. The Plain Meaning Doctrine Applies to the Constitutional Text Mandating a Decennial Census

Art. I, Sec. 2, Cl. 3 of the Constitution utilizes ordinary language to describe how the decennial census is to be conducted: "The actual Enumeration shall be made...within every...Term of ten years." Sec. 2 of the Fourteenth Amendment likewise uses ordinary language to describe the means by which the decennial census is to occur: "counting the whole number of persons in each State, excluding Indians not taxed." The operative words, "actual Enumeration" and "counting," are not words of art, nor are they imbued with special historic meaning like "due process of law." Rather, they are practical prescriptions understood by all, directing how the task of numbering the people for apportionment is to be accomplished.

On pages 40 and 41 of their brief, appellants set forth their claim that "the text of the census clause does not require the use of any particular method to determine the populations of the several states." In addressing the meaning of the constitutional language, however, appellants have neglected to

define two key words found in the relevant texts. First, in their attempt to ascertain the meaning of "enumeration," appellants made no effort whatsoever to ascertain the ordinary meaning of the word "actual," even though the constitutional text calls for an "actual enumeration." Second, appellants made absolutely no effort to determine whether the text of Sec. 2 of the Fourteenth Amendment contributes to an understanding of the meaning of "actual enumeration," even though that text explicitly addresses the way that the decennial census is to be conducted, requiring, *inter alia*, the "counting of the whole number of persons in each State."[7]

Had appellants addressed the word "actual," they would have had to concede that the enumeration must be "real," not "virtual" or "potential." At the time of the Convention, "actual" meant "really in act." Samuel Johnson, A Dictionary of the English Language (4th Ed., 1773). Had appellants acknowledged the existence of "counting" in the Fourteenth Amendment, they would have had to admit that the census mandated by the constitution had to be conducted by naming the people "one by one, or by small numbers, for ascertaining the whole," not by estimating the whole "without measuring or

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[7] In their brief supporting appellants in No. 98-564, appellees City of Los Angeles, *et al.*, argue that the "records of the debates" surrounding passage of the Fourteenth Amendment do not support the idea that the Framers of Sec. 2 of that Amendment "were exclusively committed to conducting the census through the use of a head count." L.A. Brief, No. 98-564, p. 6. This argument — which apparently rests on the fact that the primary purpose of Sec. 2 was to adjust apportionment — is not only unpersuasive, it totally ignores the fact that the plain meaning of the Fourteenth Amendment, like the plain meaning of Art. I, Sec. 2, Cl. 3 of the Constitution, requires a head count.

weighing" each component. Noah Webster, American Dictionary of the English Language (1828). Having failed to address these ordinary meanings of "actual" and "counting," appellants' proposed definition of enumeration is fatally flawed.

Compounding this error, appellants sought to define "enumeration" using a modern dictionary as their primary reference. This departs from the practice of this Court to ascertain the meaning of the ordinary language in the Constitution by primary reference to a dictionary in use at the time of the Constitutional Convention. *See* Nixon v. United States, 506 U.S. 224, 229-30 (1993). Had appellants followed this practice, they would have seen that to "enumerate" was "to reckon up singly" or "count over distinctly." Samuel Johnson, *supra*.

The plain meaning of "actual," "enumeration," and "counting" is further confirmed upon examination of the other constitutional provisions which use the same or similar words. The word "actual" appears in two other provisions. According to Art. II, Sec. 2, Cl. 1, the President is commander in chief of a state militia only when it is "called into the **actual**" service of the United States. (Emphasis added.) According to the Fifth Amendment, a member of a state militia is not entitled to the protection of the grand jury indictment guarantee **only** when the militia is "in **actual** service in time of War or public danger." (Emphasis added.) In both instances, this Court has — from the beginning — insisted that these provisions apply only when a state militia has **really entered** into the service of the United States, not just been organized and readied to enter that service. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-20, 60-64 (1820); Johnson v. Sayre, 158

U.S. 109, 114-15 (1895). As Justice Story stated, it is one thing for the Congress to "call forth the Militia" into the service of the United States; it is quite another to actually enter into that service. Houston, *supra*, 18 U.S. at 64.

The word "enumeration" also appears more than once in the Constitution. The Ninth Amendment states that "[t]he **enumeration** in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people." (Emphasis added.) While the identity of the "unenumerated" rights referred to in this Amendment have been vigorously disputed, there is no debate that the "enumeration" of rights referred to in the Amendment refer to the **actual** rights that are "specifically mentioned" in the constitutional text. *See* Griswold v. Connecticut, 381 U.S. 479, 488-93, 519-27 (1965).[8]

While the word "counting" does not appear elsewhere in the Constitution, the word "counted" appears in the provisions addressing how the votes for President and Vice-President are to be ascertained in the Electoral College. *See* Art. II, Sec. 1, Cl. 3. *See also* the Twelfth Amendment. Can there be any

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[8] Relying on the language of Art. I, Sec. 9, Cl. 4, which states that "[n]o direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken," appellants say that "the Framers understood the word 'enumeration' to be synonymous with 'census of population,' and then claim that the requirement that an "enumeration" be conducted does not dictate the use of any particular methodology in determining the total population of each State." Aplt. Brief, p. 41, n. 23. That contention is wrong, and also ignores the fact that the reference to "census or enumeration" in Art. I, Sec. 9, Cl. 4 expressly refers back to **the** "actual Enumeration" "herein before" required by Art. I, Sec. 2, Cl. 3, not to **an** enumeration generally.

doubt that such votes are to be reckoned one by one and not estimated by some formula (*e.g.*, based upon an estimated "undercount" of votes cast)? Indeed, this Court has stated that "all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted,'" that "[e]very voter's vote is entitled to be counted once," and that"[i]t must be correctly counted and reported." Gray v. Saunders, 372 U.S. 368, 380 (1963).

If "counted," in relation to an elector's vote in the electoral college, means individually computed, then surely "counting the whole number of persons in each State" in the decennial census must mean individually ascertaining that whole number. If "enumeration" in relation to the Constitution means individual specification in the written text, then "enumeration" in relation to the decennial census must likewise require individual treatment. And if "actual" in relation to the state militia's federal service requires proof of entrance into the service in fact, then "actual" in relation to the decennial census must also deal with facts, not estimates.

Only when the Constitution's terms are construed in their "natural signification" does it function harmoniously as a whole. Indeed, by attribution of identical meanings to these words throughout the constitutional text, the "simplest and most obvious interpretation" of the document is embraced — which "is the most likely to be that meant by the people in its adoption." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 671.

2. The Plain Meaning Doctrine Limits the Conduct of the Decennial Census

According to Art. I, Sec. 2, Cl. 3, the first "actual Enumeration" of the people and every subsequent enumeration was to be conducted "in such Manner as they (Congress) shall by Law direct." By limiting Congress to prescribe only the "Manner" by which the "actual Enumeration" was to be accomplished, the Constitution limited the power of Congress to enact only such legislation that is designed to provide for an "actual enumeration" of the population. This limitation upon Congressional power has been reinforced by the prescription contained in Sec. 2 of the Fourteenth Amendment that the census "[count] the whole number of persons in each State, excluding Indians not taxed." For, as this Court has ruled recently, the power of the Congress in relation to the substantive provisions of the Fourteenth Amendment is "remedial," limited to the enforcement of those provisions as written. City of Boerne v. Flores, 521 U.S. ___, 138 L.Ed. 2d 624, 636-44 (1997).

Not surprisingly, Congress has invariably provided for actual enumeration of the people, reflecting the plain meaning of the constitutional text. *See* Franklin v. Massachusetts, 505 U.S. 788, 803-06 (1992); United States Dept. of Commerce v. Montana, 503 U.S. 442, 448-56 (1990).

C. The Appellants' Argument Ignoring the Plain Meaning of the Constitutional Text Is Spurious

Appellants ask this Court to disregard the plain meaning of the census provisions of Art. I, Sec. 2, Cl. 3 and Sec. 2 of the Fourteenth Amendment in favor of permitting the decennial

census to be conducted by any means so long as it "furthers the goal of equal representation for equal numbers of people." Aplt. Brief, p. 46, n. 28. In support of this startling proposition, appellants note that the phrase "actual enumeration" was placed in Art. I, Sec. 2, Cl. 3 by the Committee of Style and Arrangement — after the Convention had approved of an earlier version that stated simply that the decennial census "be taken in such manner as the said Legislature shall direct." Because there is no record that the Convention ever considered whether the insertion of "actual enumeration" was calculated to limit such legislative power, appellants have urged that the phrase must not have been designed to impose any limitation on Congress's authority to direct the census however it sees fit, but only "to distinguish the permanent basis for apportioning Representatives from the temporary allocation set forth in the Census Clause." Aplt. Brief, pp. 43-46.

Appellants' argument is clever, but spurious, resting upon the proposition — rejected by this Court — that a constitutional text should be read not according to its final adopted form, but according to an earlier draft. In launching this subterranean attack upon the constitutional text, appellants have misapplied the rules of textual interpretation adopted and followed by this Court.

In footnote 25 on page 44 of their brief, appellants assert that this Court's opinion in Nixon v. United States, *supra*, 506 U.S. at 231, stands for the proposition that words added by the Committee of Style must be construed so as to conform to an earlier draft of the Constitution because "'the Committee of Style had no authority from the Convention to alter the

meaning' of the draft Constitution submitted for its review and revision."

In Nixon, this Court rejected this very proposition. Mr. Nixon claimed that the word "sole" as it appears in Art. I, Sec. 3, Cl. 6 has "no substantive meaning" because "the word is nothing more than a 'cosmetic edit' added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause." This Court rejected Mr. Nixon's approach, relying on the presumption that when the Committee of Style added "sole" to the text, it "captured what the Framers meant in their unadorned language." Further, this Court concluded that the Committee must have done its job because the "Constitutional Convention voted on, and accepted, the Committee of Style's linguistic variation." This Court concluded that "sole" — the word added by that Committee — "was entitled to no less weight than any other word of the text." To have concluded otherwise, the Court observed, would elevate the "second to last draft" of the constitutional text above the final version, which would violate "the well established rule that the plain language of the enacted text is the best indicator of intent." 506 U.S. at 231-32.[9]

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[9] If, as appellants maintain, "actual enumeration" should be disregarded in favor of the earlier draft, then so should the phrase "by Law." Both phrases were added by the Committee of Style, without any record that either was addressed specifically by the full Convention. If the census is to be conducted "in such manner as the **Legislature shall direct**" (emphasis added), then according to appellants' construction of Art. I, Sec. 2, Cl. 3, the 2000 Census must be carried out as Congress directs. As appellants acknowledge (Aplt. Brief, p. 5), in 1997 Congress passed a bill which directed that the census not be conducted by "sampling or any other statistical procedure," only to have the bill vetoed by the President. Without the "by Law" limit imposed on Congress by the existing constitutional text, there would have been no need to present a bill for Presidential approval or veto; if it had exclusive and non-reviewable authority, Congress could have issued a directive (*e.g.*, by joint resolution) expressly prohibiting the Commerce Department from using "sampling or any other statistical procedure" for purposes of apportionment. Thus, under the appellants' construction of Art. I, Sec. 2, Cl. 3, the will of the 105th Congress (as evidenced by the 1997 bill) that there be no sampling for purposes of apportionment in the 2000 Census would be legally and constitutionally binding

Nixon's plain meaning rule does not support appellants' denigration of "actual enumeration" to a merely descriptive, transitional term. *See* Aplt. Brief, p. 45. To the contrary, "actual enumeration" is best understood as a normative term which differentiates between the apportionment of representatives in the first House of Representatives from the apportionment method to be followed thereafter. Further, the term's plain meaning is reinforced by the historical context.

As appellants acknowledge, the initial apportionment of representatives provided for in the Constitution was based, in part, on estimates of future population growth and other non-population factors. Aplt. Brief, p. 45, n. 26. While such an expedient method of apportionment was applied at the beginning, this method was not to be repeated in the future. Instead, within three years after the first meeting of Congress, the Constitution required an "actual enumeration" of the people of each state so that the composition of the House reflected the proportion of the actual population of the states.

Given that the composition of the first House was based upon estimates, to be changed as soon as the constitutionally-required census was conducted, it is clear that the "actual enumeration" language was designed to obtain a census based upon an actual count of actual people, not another estimate. *See* J. Madison, *Notes of Debates in the Federal Convention*, pp. 267-68 (Norton: 1987 ed.) (hereinafter "*Madison's Notes*").

D. Appellants' Version of the Underlying Purposes of Article I, Section 2 Must Give Way to the Plain Meaning of the Constitutional Text

Appellants say that the meaning of "actual enumeration" should be determined by "the purposes underlying Article I, Section 2." In ascertaining those purposes, however, appellants reach beyond the constitutional text, asserting that the "fundamental goal" of the decennial census is to secure "'equal representation for equal numbers of people for the House of Representatives.'" Having extrapolated this singular purpose as the objective of the census, appellants claim that the Constitution should not be read to bar any "census-taking technique..." that "would produce more accurate population figures" than an actual headcount. Aplt. Brief, pp. 46-47.

Appellants' extrapolation is just another example of their disregard for the plain meaning doctrine of this Court. The constitutional purpose of the decennial census is not, as appellants have contended simplistically, to secure "equal representation for equal numbers of people." Rather, as Article I, Section 2 states, the purpose of the census is to ensure that the House of Representatives be chosen "by the people of the several States...according to their respective

Numbers...among the several States." Thus, the goal of the decennial census is to enumerate the actual numbers of residents of each state so that each state would be on an equal footing in relation to its inhabitants. *See Madison's Notes*, pp. 267-68.

To secure this goal, the Convention not only mandated a "periodical census," it dictated a methodology for that census, tying the hands of Congress so "that they could not sacrifice their trust to momentary considerations. *See id.* at 268. The methodology required a permanent standard, a fixed rule not left to the discretion of the legislature.

The purpose of the words "actual enumeration" is to fix the fundamental process of executing the decennial census so that the numbers cannot be manipulated to evade the constitutional objective of equal representation in proportion to the actual residents of each state. When examined in light of the constitutional purpose of the census, an actual enumeration best fulfills that purpose. Whenever government officials depart from the plain meaning of a constitutional text in order to achieve some "higher goal" — as appellants seek to do in this case — then, in the end, "'the Constitution...is in danger of being rendered a mere dead letter....'" The Board of County Commissioners v. Rollins, *supra,* 130 U.S. at 671. The plain meaning rule was fashioned in order to avoid this danger:

> Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation. [*Id.*]

III. THE CONSTITUTIONAL INTEGRITY OF THE REPUBLIC REQUIRES APPORTIONMENT BY AN ACTUAL ENUMERATION OF THE PEOPLE, NOT BY A STATISTICAL ESTIMATE OF THE POPULATION

A. An Actual Enumeration for Apportionment Is Essential to Protect the Representative Nature of the House of Representatives

One of the most extensively debated issues at the Constitutional Convention was how to insure that the House of Representatives achieved an "equitable ratio of representation" between the several states. At first, the debate focused on whether Congress should have discretion to "take a periodical census for the purpose of redressing inequalities in the Representation..." *Madison's Notes*, pp. 266-67, 271-72. Those who favored a constitutional mandate for a periodic census ultimately prevailed, persuading their fellow delegates that it was in "the nature of man...that those who have power in their hands will not give it up while they can retain it." *Id.* at 266. As General Pinckney of South Carolina bluntly said:

> [I]f the revision of the census was left to the discretion of the Legislature, it would never be carried into execution. The rule must be fixed, and the execution of it enforced by the Constitution. *Id.* at 277.

In addition to deciding to mandate a census, Convention delegates further limited Congressional discretion, defining how the census must be taken, including requirements that the census be conducted every ten years and that it be based upon an actual enumeration of people — not an estimate of the

wealth of the people. Again, the delegates were concerned that if Congress were left to its own discretion, "[t]he danger will be revived that the ingenuity of the Legislature may evade or pervert the rule so as to perpetuate the power where it shall be lodged in the first instance." *Id.* at 279. Having so limited the discretion of Congress, the Convention produced a permanent, fixed standard — an absolute rule — of reapportionment. Alexander Hamilton could assure the American people that the House of Representatives would truly be representative of the people, free from "partiality" and "oppression." *The Federalist* No. 36; *see also The Federalist* No. 58.

For over 200 years this absolute rule has served the nation well. Now, however, the current Administration seeks to abandon it. Appellants claim the authority to forego the census's continuous reliance upon an actual headcount of the people in favor of an estimate based upon statistical sampling. They rest their claim upon the contention that their sampling estimate would improve the accuracy of the census. This claim of improved accuracy, in turn, is based upon an estimate that the 1990 census could have been more accurate had it been based upon statistical sampling.

Such claims of enhanced accuracy are suspect for at least two reasons. First, sampling methods clearly are no guarantee of accuracy. Indeed, following the 1990 Census enumeration, then-Secretary of Commerce Robert Mosbacher decided not to use statistical sampling to adjust the 1990 figures — in part because of the widely divergent results caused by even the smallest changes in the assumptions undergirding the statistical models available to him. *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made, etc.*, 56

Fed. Reg. 33583 (July 15, 1991). Moreover, he observed that the development of a statistical model required essentially arbitrary decisions, which, in turn, would result in significantly different census results. *Id.* at 33600-03.

Second, the discretion inherent in the adoption and development of statistical models offers ample room for the very kind of political manipulation of the apportionment process that the Framers sought to avoid. After all, the constitutional limits upon the conduct of the census were not based upon an absence at that time of sophisticated statistical tools to arrive at an accurate estimate of the population. Rather, they were based upon the unchanging "truth...that all men having power ought to be distrusted to a certain degree." *Madison's Notes, supra*, p. 272.

Convinced of the "political depravity of man," as Madison put it, *id.*, the Constitution's framers were not willing to entrust Congress, despite all of its internal checks and balances, with the kind of discretion that appellants now claim for one man. There is far greater danger of partisan political manipulation when the conduct of the census reposes in a single individual's discretion.

The maintenance of the House of Representatives as the branch of the national legislature proportioned to the actual population of the states, as mandated by the Constitution, is reason enough to deny appellants the discretionary power that inevitably attends a census conducted by statistical sampling.

B. An Actual Enumeration for Apportionment Is Essential to Preserve Public Confidence in the Integrity of the Apportionment Process

In addition to concerns expressed about the integrity of the House of Representatives as a representative body apportioned to the population of the several states, the Constitution's Framers were concerned about ensuring the people's confidence in that body. Already mindful of the western migration of the American people, convention delegate George Mason of Virginia expressed concern that, as new states were added to the Union, they be "treated as equals and subjected to no degrading discriminations." If the people in these new states were deprived of their "equal footing" in the House of Representatives, then, he predicted, they "will either not unite with or will speedily revolt from the Union...." *Madison's Notes, supra*, at 267. Mason's fellow Virginia delegate, Edmund Randolph, echoed this concern, claiming that "[i]f a fair representation of the people be not secure, the injustice of the Government will shake it to its foundations." *Id.* at 268.

Justice Joseph Story reaffirmed the importance of having a House of Representatives which is truly representative of the people. He observed that apportioning membership in that legislative branch on the basis of population "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other which could be devised." Joseph Story, *Commentaries on the Constitution of the United States*, Section 633 (1833 ed.).

To ensure public trust, the Constitution withheld discretion from Congress as to how or whether to conduct a census, lest

they "sacrifice their trust to momentary considerations." *Madison's Notes, supra*, at 268. In other words, the Framers understood that the people's confidence in the integrity of the new House of Representatives depended upon a census that was not subject to political manipulation. Thus, they provided for an apportionment based upon actual enumeration of the people, rather than some other method susceptible, in the words of Justice Story, to "fraud and evasion."

C. An Actual Enumeration for Apportionment Is Essential in Order to Guard Against the Appearance of Political Manipulation

This year, Deputy Secretary of Commerce Robert L. Mallett remarked to the National Association of Development Organizations that "[t]he Census isn't a trivia collection. **It is the measure we use to distribute political power in the country....**" Regulatory Intelligence Data (April 27, 1998) (emphasis added). The admitted significance of a properly conducted census deserves attention, especially in light of the increasing politicization of the Commerce Department — which will supervise conduct of the 2000 Census.

Investigations conducted by the 105th Congress have reported to the American people concerning the extent of the Commerce Department's politicization. For example, in testimony before the Senate Committee on Governmental Affairs, Richard Sullivan, a former National Finance Director for the Democratic National Committee ("DNC"), addressed the relationship between this national political organization and the Commerce Department under Secretary Brown:

> Ron Brown was an aggressive Commerce Secretary. There was always this criticism that we were getting about, you know, the ties between DNC and Commerce. [Senate Committee on Governmental Affairs, 105th Cong., 2d Sess., Final Report of the Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns, ("Senate Report") "John Huang Moves From Commerce to the DNC," 20 (1998).]

After the 1992 presidential elections, the DNC identified individuals to the Commerce Department as candidates for positions at the Department. For example, John Huang, Principal Deputy Assistant Secretary for International Economic Policy, was hired after the DNC identified him as a "must-consider" candidate for several positions, including Undersecretary for International Trade at the Department of Commerce. *Id.* at 4. Jude Kearney was appointed Deputy Assistant Secretary for Service Industries and Finance after a DNC document identifying him as a candidate for that position was received by the Commerce Department. February 16, 1998 Deposition of Jude Kearney, House Committee on Government Reform and Oversight, p. 6; House Committee on Government Reform and Oversight, Interim Report, 105th Cong., 2d Sess. ("House Report"), "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," p. 15 (1998).

Moreover, Commerce Department personnel have come under serious suspicion of improper pursuit of political objectives in a variety of ways. The Boston Globe reported that "[b]usinesses that gave Democratic Party committees more than $2.3 million...won coveted seats on U.S. trade missions

during President Clinton's first term." (They also secured nearly $5.5 billion in support from the U.S. Overseas Private Investment Corporation ("OPIC")). Hohler, *Trade-trip Firms Netted $5.5 Billion in Aid; Donated $2.3 Million to Democrats*, Boston Globe, March 30, 1997, A1.[10]

Prominent DNC fundraisers were placed on official trade missions. For example:

> Mr. [Howard] Glicken even accompanied the late Commerce Secretary Ron Brown on a 1994 export promotion tour through Latin America. His mere presence troubled some delegation members: Mr. Glicken's 'wheeling and dealing' reportedly 'evoked squeamishness among a number of officials at Commerce.' His inclusion thus raised the specter of political considerations possibly affecting Commerce Department decision-making. [House Report, "FEC Enforcement Practices and the Case against Foreign National Thomas Kramer: Did Prominent DNC Fundraisers Receive Special Treatment?", p. 17.]

In addition, Secretary Brown directly participated in DNC fundraising events. For example, during an official Commerce Department trip to East Asia, Secretary Brown headlined a DNC fundraiser in Hong Kong on October 18, 1995. House

[10] The Globe noted that "one of [Secretary] Brown's top associates, Jeffrey E. Garten, then undersecretary for international trade, served on OPIC's board of directors." An OPIC spokeswoman stated that "agency officials 'may or may not have known' that companies applying for assistance had contributed to Democratic committees or sent executives on missions with Brown." *Id.*

Report, "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," pp. 24-27. Secretary Brown later headlined a DNC fundraiser in Washington, DC on November 8, 1995. *Id.*, pp. 27-29; House Report, "Unprecedented Obstacles to the Committee's Investigation," p. 17.

John Huang, who served as Principal Deputy Assistant Secretary for International Economic Policy from July 1994 to December 1995, engaged in fundraising for Democrats while at Commerce. Senate Report "John Huang at Commerce" 12 (1998). While serving in the Commerce Department, Huang successfully solicited contributions from four donors. *Id.* at 64. Huang was also reportedly involved in organizing a "fund-raising apparatus" for the Democratic National Committee while at Commerce, and in planning a Democratic National Committee fundraiser while at Commerce. *Id.* at 65-67.

According to the Senate Report, Huang had "frequent" contacts with Democratic National Committee finance officials while working at Commerce. *Id.* at 63. "Message slips and long distance calls alone...reveal scores of calls between Huang and DNC officials." *Id.* at 64.

While these reported accounts of the Commerce Department's politicization do not prove that the Census Bureau would engage in political manipulation of Census 2000 figures, it demonstrates the American people would reasonably fear such manipulation could occur. In fact, former Commerce Secretary Mosbacher noted the opportunity for manipulation in his decision **not** to use statistical sampling to adjust 1990 census figures. *See Decision of the Secretary of Commerce*, *supra*, 56 Fed. Reg. 33583, 33585, 33599-603. The potential for abuse of such opportunity would come as no surprise to our

Founding Fathers, who were well aware of "the political depravity of man." *Madison's Notes, supra*, at 272. This awareness led them to establish a constitutional mandate that the basic method of conducting the decennial census for purposes of apportionment would never be entrusted to the discretion of government officials.

CONCLUSION

For the foregoing reasons, *amici curiae* National Citizens Legal Network, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center respectfully submit that the judgment of the courts below should be affirmed.

Respectfully submitted,

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